

FILED
Court of Appeals
Division II
State of Washington
12/26/2019 9:09 AM

NO. 53723-1

(Appeal of Clark County Superior Court Case No. 19-2-00512-06)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

SIMON'S WAY DEVELOPMENT, INC., a Washington corporation,

Appellant/Petitioner,

v.

CLARK COUNTY, WASHINGTON,

Respondent,

SCOTT and ANJA O'NEIL, ERIC and MELISSA WALDAL, ROY and
DELLA MASSIE, LANA and KATHRYN HOLTZ-OLSON, RYAN and
LINDA ROSENLUND, and BRIAN and JANET WOLFE,

Respondent / Other Parties.

RESPONDENT'S BRIEF

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

WILLIAM P. RICHARDSON, WSBA #42104
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1300 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Tele: (564) 397-2478

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF THE CASE.....	2
III. ARGUMENT	4
A. Standard of Review.....	4
B. Hearing Examiner Decision.....	6
C. Superior Court Decision	8
D. Conversion	9
IV. CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Schnitzer West, LLC v. City of Puyallup</i> , 9 Wn. App. 2d 1054 (2019).....	5
Rules:	
WAC 222-16-010.....	6, 10
Statutes:	
RCW 36.70C.130.....	5, 8-9, 12
RCW 36.70C.140.....	5
RCW 76.09	6
RCW 76.09.020	6, 8
RCW 76.09.050	10
RCW 76.09.060	7
RCW 76.09.460	11

I. INTRODUCTION

This case is about whether a paved and illuminated road, that primarily serves as access to several residences, is exempt from Respondent's regulation simply because the road was briefly used to access a small timber harvest.

Respondent regulates the construction of residential roads in the unincorporated areas of Clark County, to include grading and drainage. The regulations ensure the safety of the road under expected traffic conditions and the proper management of water runoff. Respondent's regulatory process is excepted when the road is regulated by the Department of Natural Resources ("DNR") through a Forest Practice Application ("FPA"). In essence, the FPA switches regulatory authority from Respondent to DNR.

In this case, Appellant obtained a FPA for the harvest of trees on two parcels located in Respondent's jurisdiction. Appellant then constructed a primitive road that meandered along the boundaries of adjacent parcels that were not subject to the harvest. After the harvest, Appellant paved and illuminated the entire road and sold many of the parcels as single-family lots. One of the harvested parcels was sold as a single-family lot and received a Notice of Conversion from DNR for failure to continue forestry practices under the FPA. The other parcels

were not subject to the forestry activities, but did benefit from the improved road.

Appellant claims the brief forestry use of the road, prior to improvement, was sufficient to exempt the entire road from Respondent's regulation, even after improvement. Respondent disagrees.

II. STATEMENT OF THE CASE

In 2014, Roth Investments, LLC, ("Roth") owned numerous contiguous parcels.¹ In May of that year, Roth filed a FPA with the DNR.² Roth listed only two of its parcels in the FPA as being subject to forest practice.³ The permit also proposed a 100-foot road intended to serve the forestry practice, and indicated that the road would be located over "cow pasture."⁴

The FPA was approved by DNR in early June, 2014.⁵ Shortly thereafter, Roth sought to amend the FPA to extend the road to 1,500 feet.⁶ Roth did not seek to add additional parcels to the FPA, parcels over which the road would be constructed. Roth's proposed amendment was approved by DNR.⁷

¹ CP 219.

² CP 61-78.

³ CP 62. The applicant limited the "legal description" of the "forest practice" to parcels 233512000 and 233477000.

⁴ CP 61 and 67.

⁵ CP 79-80.

⁶ CP 83-84.

⁷ CP 81-82.

Roth constructed a primitive road that meandered along the boundaries of parcels that were not disclosed on the FPA, eventually terminating at one of the parcels listed in the FPA.⁸ The road remained gravel during the harvest, from July, 2014 to April, 2015.⁹ Once the harvest was complete, Roth paved and illuminated the road.¹⁰ Only then did Roth begin selling properties as single-family residential sites.¹¹

Respondent noticed the improved road and sent out notices of the violation.¹² The notices were appealed.¹³ A hearing took place November 29, 2018.¹⁴ The Hearings Examiner left the record open to allow the parties to further brief the issue as to whether the subject road was a “forest road.”¹⁵ The Hearings Examiner determined that the road was not a “forest practice,” meaning that it was not exempt from Respondent’s regulations.¹⁶ The Examiner’s more specific finding was that the road, as it lay upon parcels absent from the FPA, was not a forest practice.¹⁷

⁸ CP 48-50.

⁹ CP 155.

¹⁰ CP 44-47.

¹¹ *Compare*, CP 211 and CP 51-60.

¹² CP 85-108.

¹³ CP 109-110; *see also*, CP 22, 209 and 214: Despite Appellant’s naming of the Olson’s and Massie’s in this appeal, those two parties were dismissed at the administrative level, per the County’s request and, thus, are not appropriate parties for this matter.

¹⁴ CP 13.

¹⁵ CP 14.

¹⁶ CP 20.

¹⁷ *Id.*

DNR issued a Notice of Conversion on December 11, 2018.¹⁸ Despite the Notice of Conversion, Appellant appealed the Examiner's decision to the Superior Court.¹⁹ The Superior Court heard the appeal on July 15, 2019.²⁰ The Superior Court did not agree with the Examiner's specific finding regarding the listing of parcels in the FPA, but did find that the road was not a forest road because it was not located on forest land.²¹ Despite differing bases, the Examiner and the Superior Court both found that the road was subject to Respondent's regulations.²²

III. ARGUMENT

Both the Hearings Examiner and the Superior Court correctly decided that the road was subject to the Respondent's regulations. Despite the Superior Court's finding of error on the part of the Examiner, this Court can likely read the decisions of the Examiner and Superior Court in harmony. If not, the Appellant has failed to meet its burden to show error on the part of the Superior Court and, thus, this Court should affirm.

Standard of Review

In reviewing a LUPA decision of a Superior Court, this Court applies the same standard that the Superior Court applies to the

¹⁸ CP 308-310.

¹⁹ CP 4-11.

²⁰ CP 340.

²¹ CP 342.

²² CP 343-344.

Hearings Examiner decision.²³ RCW 36.70C.130(1) sets forth that standard.

To grant relief under LUPA, a this Court must find that the Appellant has established one of the following standards, for both the Examiner and the Superior Court: (a) proper procedure or process was not followed, (b) the law was erroneously interpreted, (c) the decision was not supported by substantial evidence, (d) the decision was clearly an erroneous application of the law to the facts, (e) the decision was made without jurisdiction or authority, or (f) the decision violated the Appellant's constitutional rights.

Despite alleging all of the standards in the LUPA Petition to the Superior Court,²⁴ Appellant narrows the standard to RCW 36.70C.130 (1)(b-d) for this Court.²⁵ If Appellant establishes any of the three standards for both the Examiner and the Superior Court, this Court may reverse or remand for modification or further proceedings.²⁶ Respondent calls this statute out because this Court is faced with a Superior Court decision that reversed the Examiner's underlying decision, but ultimately affirmed the overarching decision.

²³ *Schnitzer West, LLC, v. City of Puyallup*, 9 Wn. App. 2d 1054, 1059 (Div. II 2019).

²⁴ CP 10.

²⁵ Opening Brief p. 15.

²⁶ RCW 36.70C.140.

Hearings Examiner Decision

The Hearings Examiner correctly determined that a portion of the road was subject to Respondent's regulations. Despite the Superior Court's partial reversal, the Respondent believes the Examiner correctly determined that the portion of the road that was not disclosed under the FPA was not a "forest practice."

A "forest road" is a road laid across forest land that is intended for use as a "forest practice."²⁷ Respondent will defer a discussion of the term "forest land" for the next section of this brief, because that issue is more directly tied into the Superior Court's decision. In this section, Respondent will, instead, focus on whether the road qualifies as a "forest practice."

Forest Practices are addressed by RCW 76.09, *et seq.*, which defines "forest practice" as an activity conducted on or pertaining to forest land and relating to harvesting timber.²⁸ Arguably, that definition could be read very broadly to include things like camping and hiking, but that would render absurd results in most applications of the statute. Instead, we can find limitations to the definition by referring to other sections of

²⁷ See RCW 76.09.020(20) and WAC 222-16-010.

²⁸ RCW 76.09.020 (17) and WAC 222-16-010.

the chapter for context. In RCW 76.09.060, we find that context.²⁹ RCW 76.09.060(1)(c) allows DNR the ability to request the limitations of the forest practice through property description. DNR did exactly that by asking, in the FPA, “What is the legal description of your forest practice?”³⁰ Appellant clearly and unambiguously listed only two parcels in response to that clear and unambiguous question.³¹

What is unclear is why Appellant chose to not list all of the parcels on the FPA application or the amended application. Appellant added 1,400 feet of roadway without any attempt to notify DNR that the road would be located on additional parcels.³² One reason for this omission might be the fact that the unlisted parcels were not forested parcels.³³ Another might be that Appellant did not, in fact, wish DNR to regulate the road on those parcels as a forest practice. Either way, it is very clear that Appellant did not notify DNR that the road was part of the forest practice regulated under the FPA.

Appellant did not provide the Examiner with any evidence regarding the reasons for omitting the parcels from the FPA and the amended FPA. Appellant also did not provide the Examiner with any

²⁹ RCW 76.09.060(1)(c) states that DNR may require “Legal description and tax parcel identification numbers of the land on which forest practices are to be conducted.”

³⁰ CP 62.

³¹ *Id.*

³² CP 83-84.

³³ *Compare*, CP 48-50.

clear legal basis to refute the Examiner's interpretation of the law regarding the vesting of authority through the FPA. In that regard, the Appellant failed to prove any error of the Examiner, under RCW 36.70C.130(b-d).

Superior Court Decision

The Superior Court correctly determined that the road was subject to Respondent's regulation. The Superior Court had substantial evidence to show that the road passed over agricultural land, not forest land, such that the road did not fall under the definition of "forest road."

As stated above, a forest road must pass over forest land.³⁴ Forest land is defined as land capable of supporting a merchantable stand of timber that is not actively being used for a use which is incompatible with timber growing.³⁵ Land that is "capable of supporting a merchantable stand of timber" is arguably any parcel of land, once the soil has been properly amended to support timber growth. Application of the definition in this broad fashion would render absurd results in many scenarios. For that reason, a second qualifying provision was included in the definition, "that is not actively being used for a use incompatible with timber growing." The Superior Court observed that the FPA application

³⁴ See fn. 27.

³⁵ RCW 76.09.020(15).

asserted that the road would be constructed over pasture land.³⁶ The Court then observed that the record was devoid of any design or plan for merchantable timber.³⁷ As a final matter, a cursory observation of the record photographs reveal grassed pastures compatible only of supporting the grazing cattle. Under these observations, the Superior Court reasonably determined that grazing cattle was not compatible with the growth of juvenile timber.³⁸

Appellant did not provide the Superior Court with any evidence of forestry practices on the parcels omitted from the FPA application. Similarly, the Appellant did not provide the Superior Court with any clear legal basis to refute the Superior Court's interpretation of the law regarding the nature of the land upon which the road was constructed. In that regard, the Appellant failed to prove any error of the Superior Court under RCW 36.70C.130(b-d).

Conversion

Notwithstanding the arguments above, the road *will be* subject to Respondent's regulations simply based on the Notice of Conversion issued by DNR on December 11, 2018.

³⁶ CP 343.

³⁷ *Id.*

³⁸ CP 49-50.

Appellant asserts many times that its FPA permit is a Class III permit, such that activities conducted under the permit were exempt from Respondent's regulations.³⁹ A Class III permit is a non-conversion permit, meaning it is not appropriate if the property will be converted to a non-forestry use.⁴⁰ If Appellant converted it to a non-forestry use, the FPA would be a Class IV permit, thus, subjecting conversion activities to Respondent's regulations.

"Conversion activities" include, grading and filing in preparation for non-forestry use, construction of structures requiring government approval, and improvement of roads to a standard greater than needed to conduct forest practice activities.⁴¹ Appellant specifically graded and filled the road to follow the boundary lines of parcels unrelated to the proposed forest practice.⁴² Appellant then improved the road to a standard not necessary for the proposed forest practice.⁴³ Finally, the Appellant sold the lots for development of single-family residences, which are structures that require governmental approval.⁴⁴ It seems

³⁹ Opening Brief, pp. 1-4, 17-19 and 26.

⁴⁰ RCW 76.09.050 (*compare*, Class III and Class IV definitions).

⁴¹ WAC 222-16-010.

⁴² CP 48-50.

⁴³ Appellant admits at CP 155 that the road was only paved after the timber harvest had been completed. Additionally, the first individual buyer testified that the road was paved before purchase. CP 211, fn 3.

⁴⁴ CP 51-60.

unquestionable that Appellant conducted conversion activities in relation to the FPA.

Moreover, it seems fairly clear, from the construction of the meandering road, that Appellant had the intention to convert to non-forestry use at the time of the FPA application.⁴⁵

In recognition of the above facts, DNR issued a Notice of Conversion on December 11, 2018.⁴⁶ That notice required compliance with RCW 76.09.460, which requires compliance with local regulation.⁴⁷

In that context, Appellant must now choose between two positions. Either the road is a “forest road,” or it is not a “forest road.” If it is a “forest road,” then Appellant must admit that it was improperly converted to a condition above and beyond that required to conduct forestry practice, which would subject the road to Respondent’s regulations. If it is not a “forest road,” then it was never immune from Respondent’s regulations. No matter the position, the road will be subject to Respondent’s regulations.

IV. CONCLUSION

This Court should deny this appeal because Appellant failed to establish any error on the part of the Hearings Examiner or the Superior

⁴⁵ Compare, CP 61-78, 155 and 211.

⁴⁶ CP 308-310.

⁴⁷ See RCW 76.09.460(2)(c).

Court under RCW 36.70C.130(1)(b-d). To do so, this Court would need to ignore the Superior Court's reversal of the Examiner's underlying decision. In effect, this Court would affirm the overarching decisions of both the Examiner and Superior Court that the road is subject to Respondent's regulations. That finding could then be supported by the underlying reasoning of both the Examiner and the Superior Court.

If this Court cannot ignore the reversal aspect of the Superior Court's decision, then this Court should still deny the appeal on one of two bases. First, this Court could simply affirm the Superior Court's decision in whole, thus, denying Appellant's appeal. Second, because this Court sits in the place of the Superior Court for review, this Court could focus only on the Examiner's decision. In doing so, this Court could affirm the decision, in essence ignoring the Superior Court's reversal. In that scenario, this Court would then be free to additionally affirm the Superior Court's basis for denying Appellant's appeal without addressing the reversal.

Under any scenario, this Court should deny Appellant's appeal because Appellant failed to show that both the decisions of the Hearings

//////

Examiner and the Superior Court were error due to misinterpreted law, or erroneous application of the law to the facts.

DATED this 26th day of December, 2019.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

s/ William P. Richardson
William P. Richardson, WSBA 42104
Deputy Prosecuting Attorney
Civil Division
PO Box 5000
Vancouver WA 98666-5000
Tele: (564) 397-2478
Email: bill.richardson@clark.wa.gov

CERTIFICATE OF SERVICE

On this 26th day of December, 2019, I, Thelma Kremer, hereby certify that I caused a copy of the foregoing *Respondent's Brief* to be filed with the Clerk of the Court using the Washington State Appellate Courts' Portal, which will send notification of such filing to the following:

LeAnne Bremer
Miller Nash Graham & Dunn
Email: leanne.bremer@millernash.com

and I hereby certify that copies of the foregoing were mailed by U.S. mail on this 26th day of December, 2029, to the following who are non-participant parties with the Court portal:

Scott and Anja O'Neil
27002 NE 182nd Ave
Battle Ground WA 98604

Roy and Della Massie
906 NE 11st Ct
Battle Ground, WA 98604

Ryan and Linda Rosenlund
PO Box 2002
Battle Ground WA 98604

Eric and Melissa Waldal
26905 NE 180th Court
Battle Ground WA 98604

Alan and Kathryn Holtz-Olson
18111 NE 266th Street
Battle Ground WA 98604

Brian and Janet Wolf
3444 Shawnee Drive
Norco CA 92860

DATED this 26th day of December, 2029.

s/ Thelma Kremer
Thelma Kremer, Legal Secretary

CLARK COUNTY PROSECUTING ATTORNEY

December 26, 2019 - 9:09 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53723-1
Appellate Court Case Title: Simon's Way Development, Inc, Appellant v. Clark County, Respondent
Superior Court Case Number: 19-2-00512-6

The following documents have been uploaded:

- 537231_Briefs_20191226090851D2871620_5023.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 53723-1 Simons Way v Clark Cnty - Respondent Brief.pdf

A copy of the uploaded files will be sent to:

- heather.harmon@millernash.com
- leanne.bremer@millernash.com
- thelma.kremer@clark.wa.gov

Comments:

Sender Name: Thelma Kremer - Email: thelma.kremer@clark.wa.gov

Filing on Behalf of: William Paul Richardson - Email: Bill.Richardson@clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:
PO Box 5000
Vancouver, WA, 98666-5000
Phone: (360) 397-2261 EXT 4476

Note: The Filing Id is 20191226090851D2871620